No. 14393

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM ROSS PHILLIPS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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WILLIAM ROSS PHILLIPS,

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REPLY BRIEF OF APPELLEE.

I.

Statement of Jurisdiction.

Appellant, William Ross Phillips, was indicted by the Federal Grand Jury in and for the Southern District of California on July 15, 1953 together with one Salvatore Anthony Ferraro. The Indictment charged appellant Phillips and Ferraro with violations of Title 18, Section 1005 (False Entry in Record of National Bank) and Title 18, Section 371 (Conspiracy). [Tr. pp. 2-4.][1]

On July 27, 1953 appellant Phillips appeared for arraignment and plea represented by Joseph T. Forno, Esquire, before the Honorable Peirson M. Hall, United

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[1]"Tr." refers to Transcript of Record.

States District Judge, and entered a plea of not guilty to the offenses charged in the Indictment.

On February 2, 1954 the case was called for trial before the Honorable Ben Harrison, United States District Judge, sitting with a jury, and on February 9, 1954 the jury returned a verdict of guilty as to the appellant Phillips to each count charged in the Indictment. [Tr. p. 6.]

On February 23, 1954 appellant William Ross Phillips was sentenced to imprisonment for a period of five years in a penitentiary on Count One, and a period of five years in a penitentiary on Count Two, both periods of imprisonment to run concurrently.

The district court had jurisdiction of this cause of action under United States Code, Title 18, Section 3231.

This Court has jurisdiction under Section 1291, Title 18, United States Code.

II.

Statutes Involved.

Title 18, United States Code, Section 371, provides in its pertinent part:

> "Section 371—Conspiracy to commit offense or to defraud United States.
>
> "If two or more persons conspire either to commit any offense against the United States, . . . and one or more of such persons do any act to effect the object of such conspiracy, each shall be fined not more than $10,000, or imprisoned not more than five years, or both."

Title 18, United States Code, Section 1005 provides in its pertinent part as follows:

"Section 1005—Bank entries, reports and transactions. . . .

"Whoever makes any false entry in any book, report or statement of such bank with intent to injure or defraud such bank. . . .

"Shall be fined not more than $5000 or imprisoned not more than five years, or both."

III.

Statement of the Case.

The Indictment charges as follows:

"The grand jury charges:

"COUNT ONE

"(U.S. C., Title 18, Section 1005)

"On or about February 18, 1953, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant SALVATORE ANTHONY FERRARO, then being an employee, namely: a teller of the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, did make a false entry in a savings ledger card for the account of defendant WILLIAM ROSS PHILLIPS with intent to injure and defraud said bank, namely: an entry of a deposit of $10,000.00 to said account, and at the time heretofore mentioned, said bank was a member of the Federal Reserve Bank of San Francisco; and the defendant WILLIAM ROSS PHILLIPS did command, induce and procure the commission of the above offense by defendant SALVATORE ANTHONY FERRARO.

"COUNT TWO

"(U.S.C., Title 18, Section 371)

"Beginning on or about February 18, 1953, and continuing to March 1, 1953, the defendants WILLIAM ROSS PHILLIPS and SALVATORE ANTHONY FERRARO did agree, confederate, and conspire to commit an offense against the United States as follows: defendant SALVATORE ANTHONY FERRARO, an employee of the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, would make a false entry on a savings ledger card for the account of defendant WILLIAM ROSS PHILLIPS showing the deposit of $10,000.00 to said account, with the intent to injure and defraud said bank which was then and there a member of the Federal Reserve Bank of San Francisco;

"The object of said conspiracy was to be accomplished as follows: the defendant WILLIAM ROSS PHILLIPS would open a savings account in said bank in the sum of $200.00; thereafter, defendant SALVATORE ANTHONY FERRARO would show on the savings ledger card a deposit of $10,000.00 to said account; thereafter, said defendant WILLIAM ROSS PHILLIPS would cash checks upon said savings account in an amount in excess of $9,000.00;

"To effect the object of said conspiracy the defendants committed divers overt acts in the Central Division of the Southern District of California among which were the following:

"(1) On February 18, 1953, the defendant WILLIAM ROSS PHILLIPS opened a savings account at the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, in the amount of $200.00;

"(2) On February 18, 1953, at Los Angeles, California, defendant SALVATORE ANTHONY FERRARO made a fictitious entry on the savings ledger card of the account of defendant WILLIAM ROSS PHILLIPS in said bank showing a deposit of $10,000.00 to said account;

"(3) On February 26, 1953, at Los Angeles, California, the defendant WILLIAM ROSS PHILLIPS withdrew $2,000.00 from said savings account;

"(4) On February 28, 1953, at Los Angeles, California, the defendant WILLIAM ROSS PHILLIPS withdrew $7,000.00 from said savings account." [Tr. pp. 2-4.]

On July 27, 1953 appellant Phillips appeared for arraignment and plea represented by Joseph T. Forno, Esquire, before the Honorable Peirson M. Hall, United States District Judge, and entered a plea of not guilty to the offenses charged in the Indictment.

On October 20, 1953 the case was called for trial before the Honorable Harry C. Westover, United States District Judge, sitting with a jury. At the time of trial and before impanelment of the jury, the Indictment against co-defendant Salvatore Anthony Ferraro was dimissed upon motion of the Government.

The case proceeded to trial, and on October 27, 1953 the jury being deadlocked, the trial court declared a mistrial and discharged the jury.

On February 2, 1954 the case was called for re-trial before the Honorable Ben Harrison, United States District Judge, sitting with a jury.

The case proceeded to trial, and on February 9, 1954 the jury returned a verdict of guilty to each count charged in the Indictment. [Tr. p. 6.]

On February 23, 1954 the Honorable Ben Harrison, upon hearing, denied appellant's motion for a new trial filed February 15, 1954. [Tr. p. 11.]

On February 23, 1954 appellant William Ross Phillips was sentenced to imprisonment for a period of five years in a penitentiary on Count One, and a period of five years in a penitentiary on Count Two, both periods of imprisonment to run concurrently.

Appellant assigns as error the judgment of conviction on the following grounds:

A. The evidence is insufficient to justify the verdict. The verdict is contrary to the law and the evidence. [App. Spec. of Error I; App. Br. p. 5.][2]

B. A person who is not a bank teller cannot be convicted of false entry in the records of a national bank when the charge against the person who actually makes the entry is dismissed. [App. Spec. of Error I(A); App. Br. p. 5.]

C. The Court erred in the limiting and excluding of the cross-examination of the witness Ferraro particularly when being questioned about his draft evasion and flight. This was necessary in establishing his motive in blaming the appellant. [App. Sec. of Errors III; App. Br. p. 5.]

D. Count Two fails to charge an offense against the laws of the United States in that the charging part of the Indictment fails to charge appellant with the crime of conspiracy. [App. Spec. of Error II; App. Br. p. 5.]

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[2]"App. Spec. of Error refers to "Appellant's Specification of Errors"; "App. Br." refers to Appellant's Brief.

E. The district court committed prejudicial error in raising the bail in the trial without notice, without a motion by the Government, and without a hearing. This violated Rule 46(a) Rules of Criminal procedure for the District Court of the United States. [App. Spec. of Error IV; App. Br. p. 5.]

F. The Court erred in its instructions to the jury. [App. Spec. of Error V; App. Br. p. 6.]

G. The motion for a new trial should have been granted in view of the affidavit of Althea Hale [R. Tr. 1314], that her testimony in the second trial was false as the result of fear of being embarrassed and threatened with jail if she did not change her testimony. [App. Spec. of Error VI; App. Br. p. 6.]

IV.

Statement of the Facts.

Appellant William Ross Phillips met one Salvatore Anthony Ferraro in 1951. [R. p. 52.][3] After seeing Phillips three or four times in 1951, Ferraro did not see Phillips again until June 1952. [R. pp. 52-53.] In January 1953, Ferraro again met Phillips. [R. pp. 53-54.] Ferraro was then employed by the Bank of America, working at the Western and Santa Monica Branch.

Phillips and Ferraro discussed a business transaction involving the transportation and sale of automobiles to Mexico. [R. pp. 54-55.] Phillips also told Ferraro it would be necessary to get an investor to invest $10,000 in the venture. [R. p. 56.] Phillips then suggested to

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[3]"R." refers to Reporter's Transcript of Proceedings.

Ferraro that he, Ferraro, take a bank pass book and fill it out to show to prospective investors a deposit of $10,000. [R. p. 57.] Ferraro did this and gave the book to Phillips. [R. p. 57.]

A few days later, Phillips told Ferraro that this scheme had not worked on the prospective investor. [R. p. 58.] It would be necessary for them to open a legitimate account and have Ferraro make an entry of $10,000 on the ledger card. [R. p. 58.] This would be necessary to show the prospective investor a deposit had been made at the bank.

On February 18, 1953, Phillips opened an account at the Bank of America, Western and Santa Monica Branch, making an opening deposit of $200. [R. pp. 32-33.] Phillips was given a signature card which he filled out and returned to the bank clerk. [R. p. 33.] He was given a savings pass book showing an opening deposit of $200. [Government's Ex. 3; R. p. 35.] A savings ledger card was opened showing an opening deposit of $200. [Government's Ex. 4; R. p. 42.] Ferraro then made an entry of $10,000 on the savings ledger card. [R. p. 59.] He received no money at the time the entry was made from the defendant Phillips. [R. p. 59.] There was no savings deposit slip made to support the entry of $10,000. [R. p. 59.] It was an entry made without receipt of money or voucher—a false entry. At the time of the making of the entry in the savings ledger card, Ferraro was an employee of the Bank of America, Western and Santa Monica Branch. [R. p. 62.] The Bank of America,

Western and Santa Monica Branch, is a member of the Federal Reserve System.

During the two weeks following the making of the entry by Ferraro on the savings ledger card, Phillips made withdrawals of $100 [Government's Ex. 8], $2,000 [Government's Ex. 9], and $7,000. [Government's Ex. 10.]

At the first trial, one Miss Althea M. Hale testified:

"Q. (By Mr. Forno): Miss Hale, I understand you are retired now, but before retirement, what was your business or occupation? A. Before retirement?

Q. Yes. Well, I just was going to school.

Q. You taught school. For how long? A. About 43 years.

Q. That was in the city school district of Los Angeles, is that correct? A. The last 26 years.

Q. Now, Miss Hale, are you acquainted with Mr. Phillips, the gentleman seated over to my right? A. Yes, sir.

Q. About how long have you known Mr. Phillips? A. Probably about nine years.

Q. During that time have you had any business transactions with Mr. Phillips where you have given him money? A. Yes.

Q. On about how many occasions? A. Oh, perhaps maybe twice.

Q. Miss Hale, calling your attention to the month of January or February of this year, did you have any conversation with Mr. Phillips concerning putting up some money for him to start a television business? A. Yes.

Q. About when were these first conversations? Were they in January or February? A. In January.

Q. Then later did you give Mr. Phillips some money? A. Yes.

Q. Calling your attention to the middle of February, particularly February 18th of this year, did you have occasion to see Mr. Phillips at a bank or branch of the Bank of America? A. Yes.

Q. What branch was it? Where did you see Mr. Phillips? A. Western and Santa Monica, Bank of America.

Q. Western and Santa Monica Branch of the Bank of America? A. That is right.

Q. What was the occasion for your meeting him there? Had there been some prearrangement for you to meet him, or did you just happen to be there? A. There had been an arrangement to meet him.

Q. Do you recall the time of day you met him? A. In the morning.

Q. When you met Mr. Phillips, what did you do? What did you do after you met Mr. Phillips? A. Well, I gave him some money to deposit for his program.

Q. This was money that you were investing with him or loaning to him, or something like that? A. That's right.

Q. How much money was it? A. Ten thousand.

Q. $10,000. Was that in cash or check? A. It was in cash.

Q. Do you recall the denomination of the bills? A. Yes. They were $100 bills.

Q. After you met Mr. Phillips at this Bank of America, Santa Monica and Western Branch, did you see that money deposited? A. I did.

Q. At the window there? A. Yes. I gave him the money and he made out the slip.

Q. He made out the slip and deposited it? A. Yes.

Q. Did you see an item entered in the bank book by a teller that day? A. Yes, sir.

Q. I show you Defendant's Exhibit B, which purports to be the bank book, Bank of America, the account of William R. Phillips, and call your attention to an item of $10,000, the second item. Does that appear to be the item that you saw entered in the book that day? A. Yes, sir.

Q. Can you describe the teller, or did you have occasion to notice who the person was, a man or a woman, at the teller's cage when that money was deposited. A. Well, it was a man.

Q. It was a man? A. Yes.

Q. Can you describe him? I mean did you pay any particular attention? A. No. He was a dark complected man.

Q. If you saw him again in court, do you think you would recognize him? A. I doubt it." [R. pp. 256-259.]

At the second trial, Miss Hale testified that she did not meet Phillips on February 18, 1953 at the Bank of America, Santa Monica and Western Branch. [R. pp. 218-219.] On cross-examination, Miss Hale testified she had not given Phillips, or deposited in Phillips' account at any bank, $10,000. [R. p. 234.]

At the motion for new trial, appellant filed an affidavit of Althea M. Hale, alleging her testimony at the second trial was induced by officers and friends threatening her with jail. [Tr. pp. 13-14.]

Appellant denied essentially all the facts concerning the false entry transactions.

ARGUMENT.

A. A Person Who Is Not Himself an Employee of a Bank Can Be Convicted of Violation of Title 18, United States Code, Section 1005 (Making a False Entry in the Record of a National Bank).

Title 18, Section 1005, provides in its pertinent part:

"Section 1005—Bank Entries, Reports and Transactions. . . .

"Whoever makes any false entry in any book, report or statement of such bank with intent to injure or defraud such bank, . . .

"Shall be fined not more than $5000, or imprisoned not more than five years, or both."

Title 18, Section 2, provides in its pertinent part:

"Section 2—Principals.

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission *is a principal.*" (Emphasis ours.)

Appellant Phillips is charged in Count One of the Indictment as follows:

"COUNT ONE

"(U.S.C., Title 18, Section 1005)

"On or about February 18, 1953, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant SALVATORE ANTHONY FERRARO, then being an employee, namely: a teller of the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, did make a false entry in a savings ledger card for the account of defendant WILLIAM ROSS PHILLIPS with intent

> to injure and defraud said bank, namely: an entry of a deposit of $10,000.00 to said account, and at the time heretofore mentioned, said bank was a member of the Federal Reserve Bank of San Francisco; and the defendant WILLIAM ROSS PHILLIPS did command, induce and procure the commission of the above offense by defendant SALVATORE ANTHONY FERRARO."

A reading of the applicable portion of Section 1005, Title 18, United States Code, discloses that it is not necessary to a violation of this section that the person actually making the entry be a bank employee. Its reference is to *"whoever* makes any false entry" and makes no reference to "officer, director, agent or employee" making a false entry.

Assuming, but not conceding, that it is necessary for an employee to make the entry, a person may be charged and convicted, as appellant Phillips was in the present case, under Title 18, Section 2, as a principal.

The Supreme Court in the case of *United States v. Giles,* 300 U. S. 41, considered a conviction under a provision making it a crime for an employee to make a false entry in the records of a bank where the evidence showed that the entry had been made by an innocent intermediary. The Court said at page 48:

> "The statute denounces as criminal one who with intent etc. 'makes any false entry'. The word 'make' has many meanings among them 'to cause to exist, appear or occur' Webster's International Dictionary, Second Ed. To hold the statute broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows gives to the words employed their fair meaning and is in accord with the evident intent of Congress. *To hold*

that it applies only when the accused personally writes the false entry or affirmatively directs another so to do would emasculate the statute to defeat the very end in view." (Emphasis ours.)

The present case presents stronger facts than the *Giles* case (*Supra*). Phillips concocted the plan originally. [R. pp. 57-58.] He later withdrew the funds. [Government's Exs. 8, 9 and 10.] It would be impossible to say that he was not at least an aider and abettor as he is charged in the Indictment. As such he could be convicted as a principal pursuant to Title 18, United States Code, Section 2.

B. Count Two of the Indictment Alleges an Offense Against the United States.

Count Two of the Indictment charges:

"COUNT TWO

"(U.S.C., Title 18, Section 371)

"Beginning on or about February 18, 1953, and continuing to March 1, 1953, the defendants WILLIAM ROSS PHILLIPS and SALVATORE ANTHONY FERRARO did agree, confederate, and conspire to commit an offense against the United States as follows: defendant SALVATORE ANTHONY FERRARO, an employee of the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, would make a false entry on a savings ledger card for the account of defendant WILLIAM ROSS PHILLIPS showing the deposit of $10,000.00 to said account, with the intent to injure and defraud said bank which was then and there a member of the Federal Reserve Bank of San Francisco;

The object of said conspiracy was to be accomplished as follows: the defendant WILLIAM Ross PHILLIPS would open a savings account in said bank in the sum of $200.00; thereafter, defendant SALVATORE ANTHONY FERRARO would show on the savings ledger card a deposit of $10,000.00 to said account; thereafter, said defendant WILLIAM Ross PHILLIPS would cash checks upon said savings account in an amount in excess of $9,000.00;

"To effect the object of said conspiracy the defendants committed divers overt acts in the Central Division of the Southern District of California among which were the following:

"(1) On February 18, 1953, the defendant WILLIAM Ross PHILLIPS opened a savings account at the Bank of America, National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, in the amount of $200.00;

"(2) On February 18, 1953, at Los Angeles, California, defendant SALVATORE ANTHONY FERRARO made a fictitious entry on the savings ledger card of the account of defendant WILLIAM Ross PHILLIPS in said bank showing a deposit of $10,000.00 to said account;

"(3) On February 26, 1953, at Los Angeles, California, the defendant WILLIAM Ross PHILLIPS withdrew $2,000.00 from said savings account;

"(4) On February 28, 1953, at Los Angeles, California, the defendant WILLIAM Ross PHILLIPS withdrew $7,000.00 from said savings account."

Title 18, Section 371, provides in its pertinent part:

"Section 371—Conspiracy to commit offense or to defraud the United States.

"If two or more persons conspire . . . to commit any offense against the United States . . .

> and one or more of such persons does any act to effect the object of the conspiracy, each shall be fined not more than $10,000, or imprisoned more than five years, or both."

The crime of conspiracy defined in Title 18, United States Code, Section 371, contemplates a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose. Conspiracy has been described by the Courts as a "partnership in crime". (*United States v. Kissell,* 218 U. S. 601; *Marino v. United States,* 91 F. 2d 691.)

The Supreme Court in the case of *United States v. Falcone,* 311 U. S. 205, describes a conspiracy at page 210 by saying:

> "The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy."

A conspiracy then requires one, an agreement between two or more persons; two, an unlawful purpose for a lawful purpose procured in an unlawful manner; and, three, an overt act in furtherance of the agreement.

The conspiracy in the present case is charged in the following language:

> "Beginning on or about February 18, 1953, and continuing to March 1, 1953, the defendants William Ross Phillips and Salvatore Anthony Ferraro did agree, confederate and conspire to commit an offense against the United States as follows: Defendant Salvatore Anthony Ferraro, an employee of the Bank of America National Trust and Savings Association, Western and Santa Monica Branch, Los Angeles, California, would make a false entry on a savings

ledger card for the account of defendant William Ross Phillips showing the deposit of $10,000.00 to said account with the intent to injure and defraud said bank which was then and there a member of the Federal Reserve Bank of San Francisco;"

This language charges an agreement to commit an unlawful act, that is to make a false entry in the records of a national bank. Following this language the overt acts committed in furtherance of the conspiracy are alleged. The agreement followed by commission of an overt act completes the conspiracy. The overt act may be committed by any one of the conspirators. It is clear that Count Two makes these necessary allegations and therefore does allege an offense against the United States.

C. There Was No Error in the Limitation of Cross-Examination by Appellant of the Witness Ferraro.

It must be conceded that a full and complete cross-examination of a witness upon the subject of his examination in chief is a right and not a privilege afforded to the party against whom the testimony is being offered. (*Alford v. United States,* 282 U. S. 687; *Lindsey v. United States,* 133 F. 2d 368.)

Beyond that however, the limits of cross-examination are within the broad and sound discretion of the trial court. The discretion of the trial court in limiting cross-examination should be reversed only where manifest error by abuse of discretion is evident. (*Todorow v. United States,* 173 F. 2d 439, 447, cert. den. 337 U. S. 925.)

A reading of the cross-examination of the witness Ferraro [R. pp. 63-80] manifestly shows counsel for ap-

pellant was allowed considerable cross-examination in an attempt to impeach the testimony in chief of the witness Ferraro.

It is submitted there was no abuse of discretion by the trial court in refusing to allow further cross-examination of the witness Ferraro concerning his draft status and therefore the judgment should be affirmed.

D. The Trial Court Committed No Error in Exonerating Appellant's Bail and Raising It to $10,000 During the Trial.

The problem of bail is regulated at length by rule 46 of the Federal Rules of Criminal Procedure. Rule 46 provides in its pertinent part:

> "(a) Right to bail.
>
> "(1) Before conviction. A person arrested for an offense not punishable by death shall be admitted to bail. . . .
>
> "(2) . . .
>
> "(b) . . .
>
> "(c) Amount. If the defendant is admitted to bail the amount thereof shall be such as in the judgment of the Commissioner or Court or Judge or Justice will insure the presence of the defendant having regard to the nature and circumstance of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, and the character of the defendant."

A further limitation is placed upon the determination of bail by the Federal Constitution Eighth Amendment which provides:

> "Excessive bail shall not be required."

It is apparent therefore that bail before conviction for an offense not punishable by death is a *matter of right.* The amount of that bail is however *a matter within the sound discretion of the trial court.* So long as it is not excessive under the circumstances, a defendant is not prejudiced even though he might not be able to provide the required amount.

Further, excessiveness of bail cannot be urged on appeal after conviction. (*O'Brien v. United States,* 25 F. 2d. 90; *Hewitt v. United States,* 110 F. 2d 1, cert. den. 310 U. S. 641.)

The argument of appellant herein, however appears to proceed upon the theory that the action of the trial court in revoking his bail and increasing it to $10,000 was prejudicial to the preparation of his defense. This position is untenable as disclosed by the record. [R. 245-247, 250-271.] A reading of this portion of the record would indicate that appellant was deprived of no right to have witnesses on his behalf. On several occasions both the trial court and the United States Attorney offered to secure the appellant's witnesses for him. The processes of the court were open to him. He chose to refuse these opportunities to obtain witnesses in his defense. He should not now be heard to complain of his own voluntary act in refusing the aid of the United States Attorney or the Court. Further, appellant was represented by counsel of his own choosing. Appellant refused to divulge to his counsel the whereabouts of the witnesses he wished to call. [R. p. 247.] It cannot be said any action of the Court resulted in prejudice to his defense. If witnesses were available and not produced the fault must necessarily be with the appellant himself and not with the action of the trial court.

Appellant was charged with serious crimes. After hearing the testimony of Althea M. Hale, the trial court recommended further prosecution of the appellant for subornation of perjury. [R. p. 248.] It was not in abuse of discretion under the circumstances presented here for the trial court to increase appellant's bail, and therefore, the judgment should be affirmed.

E. There Was No Error in the Instructions of the Court.

Appellant's argument here proceeds upon the same theory as the argument presented in I(A) of appellant's opening brief. It is respectfully requested therefore that the Court apply the argument in opposition thereto in this brief as opposition to the point raised here. [Government's Ex. A herein.]

Further, no objection to the instructions pursuant to Rule 30, Federal Rules of Criminal Procedure, was made by counsel for the appellant.

The Federal Rules of Criminal Procedure, Rule 30 provides:

> "Rule 30—Instructions.
>
> "At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written request that the Court instruct the jury on the law as set forth in the request. At the same time copies of such request shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the request prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. No party may assign as error any portion of a charge or omission therefrom unless he

objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Failure of counsel for the appellant to make any objection to the instructions as given by the trial court waives this error, if any, and therefore the judgment should be affirmed.

F. There Was No Error in the Denial of Appellant's Motion for a New Trial.

A new trial was requested by appellant Phillips on the ground that one Althea M. Hale had upon the trial of the case testified falsely. This is evidenced by an affidavit filed in support of the motion for a new trial. [Tr. pp. 13-14.] It should be noted at the outset, however, that the Government did not offer the testimony of Althea M. Hale. Her testimony upon the occasion of both trials was offered by and on behalf of the appellant Phillips. [R. pp. 218-235.] Appellant should not now be heard to complain of the nature of this testimony.

A parallel question was recently considered in the case of *United States v. Troche,* 213 F. 2d 401.

In the *Troche* case (*supra*), the defendant was convicted of selling marihuana. At the motion for a new trial the defendant presented a recantation by affidavit of the testimony of the chief government witness against him. At the hearing of the motion a repudiation of the recantation was presented by the Government based on depositions taken of the Government witness involved. The trial judge denied the motion for a new trial. In

affirming the judgment, the Court of Appeals said at page 403:

> "Where the newly discovered evidence consists of recantation of testimony given at the trial, such recantation is 'looked upon with the utmost suspicion'. As this Court pointed out in *Harrison v. United States,* 2 Cir., 7 F. 2d 259, 262. The motion should be granted only when the 'Court is reasonably well satisfied that the testimony given by a material witness is false,' and particularly is this true when the recantation has itself been repudiated. *Larrison v. United States,* 7 Cir., 24 F. 2d 82, 87; *Gordon v. United States,* 6 Cir., 178 F. 2d 896, 900."

See, also:

Harrison v. United States, 7 F. 2d 259, 262.

In the present case the facts are much stronger in support of the trial court's denial of the motion for a new trial. There was a hearing on the motion. It was entertained by the Court and denied. The Court exercised its discretion in that denial. The Court was aware of the testimony of Althea M. Hale at the first trial. The Court also heard the testimony at the second trial. The Court, upon motion for a new trial, had before it the affidavit of Althea M. Hale. The Court denied upon consideration of all these factors the motion for a new trial of appellant Phillips.

Further, Althea M. Hale was not a Government witness. She was called by the defense. Appellant should not now be heard to complain of the testimony given by his own witness.

There was no error in the denial of the motion for a new trial and it is therefore respectfully submitted that the judgment of the trial court should be affirmed.

Conclusion.

There was no error in the rulings of the trial court during the trial of this case and therefore it is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief of Criminal Division;

MANUEL L. REAL,
Assistant United States Attorney;

MANUEL L. REAL,
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